



Decision No. C99-534

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 98A-319T

IN THE MATTER OF PETITION OF E.SPIRE COMMUNICATIONS, INC AND
ACSI LOCAL SWITCHED SERVES DBA E.SPIRE FOR ARBITRATION OF
AN AMENDMENT TO AN INTERCONNECTION AGREEMENT WITH U S WEST
COMMUNICATIONS, INC. PURSUANT TO SECTION 252(B) OF THE TELE-
COMMUNICATIONS ACT OF 1996.

**BUILDING ON APPLICATIONS FOR APPROVAL
OF PROPOSED AMENDMENT
TO INTERCONNECTION AGREEMENT**

Mailed Date: May 25, 1999
Adopted Date: May 12, 1999

I. BY THE COMMISSION

A. Statement

This matter comes before the Commission for consideration of the Application for Approval of Proposed Amended Interconnection Agreement filed by e.spire Communications, Inc. ("e.spire"), on April 7, 1999, and the Application for Approval of Amendment to Interconnection Agreement filed by U S WEST Communications, Inc. ("USWC"), also on April 7, 1999. The applications request that we approve proposed amendments to the existing interconnection agreement between e.spire and USWC. The parties did not agree on the proposed amendments. There are four points of contention: (1) the rates and charges applicable to interstate frame relay traffic; (2) whether e.spire is obli-

gated to pay separately for the Network to Network Interface ("NNI") port on USWC's switch with respect to intraLATA traffic; (3) which party is initiating a Permanent Virtual Circuit ("PVC") with respect to the obligation to pay NNI termination charges; and, (4) what are e.spire's obligations to pay for the NNI port on USWC's switch with respect to interLATA traffic. The parties submitted memoranda in support of their respective positions and requested that we resolve these issues. Now being duly advised in the matter, we direct that the parties jointly file, within 15 days of the effective date of this order, an amended interconnection agreement in accordance with the decision below.

B. Discussion

1. This docket concerns e.spire's petition for Commission arbitration of interconnection disputes with USWC under the provisions of 47 U.S.C. § 252. e.spire requested that USWC be ordered to interconnect its Frame Relay Network with e.spire's Frame Relay Network. In Decision Nos. C98-1057, C98-1266, and C99-125 we ordered such interconnection on the terms and conditions specified there. By previous orders in this docket, e.spire and USWC were required to file their amendment to their interconnection agreement for consideration and approval by the Commission. Because the parties were unable

fully to agree on a revised interconnection agreement, each submitted a separate application.

2. The first dispute between the parties concerns the applicability of the amended interconnection agreement to interstate frame relay traffic. e.spire's proposed provision states that the terms and conditions set forth in the amended agreement apply whether the interconnection is used to support intrastate or interstate PVCs. USWC's proposal states that the contract's provisions apply only to the transport and termination of intrastate frame relay traffic; the rates, terms, and conditions for interstate frame relay service will continue to be those established by tariffs filed with the Federal Communications Commission ("FCC").

3. USWC suggests that the Commission lacks the authority to establish rates, terms, and conditions for interconnection used to support the establishment of interstate PVCs. This argument is based upon the provisions 47 U.S.C. § 251(g). That statute applies to the provision of exchange access to providers such as interexchange carriers, when those carriers seek access for the purpose of terminating their own traffic. *Comptel v. Federal Communications Commission*, 117 F.3d 1068 (8th Cir. 1997). Accord: First Report and Order, 11 FCC Rcd 15, paragraph 191 (FCC 1996). To the extent USWC contends that we lack the authority to establish the terms and conditions of

interconnection with another carrier when that interconnection will be used to provide interstate services, we disagree. Indeed, the FCC itself has declared that a State commission's arbitration authority under § 252 (e.g., the instant proceeding between USWC and e.spire) extends to both intrastate and interstate matters. First Report and Order, paragraph 84.

4. Nevertheless, we will direct that the interconnection agreement between e.spire and USWC, with respect to Paragraph J(5), incorporate those terms suggested by USWC. Notably, e.spire concedes (Memorandum in Support of Contract Language, page 6) that it will use the frame relay interconnection with USWC, in part, to provide exchange services to itself. We, therefore, agree with USWC that e.spire should pay the FCC tariffed rates applicable to interstate frame relay traffic.

5. The second dispute between the parties concerns e.spire's obligation to pay for the NNI port on USWC's switch with respect to intraLATA traffic. USWC proposes that Paragraph J(6)(a) of the interconnection agreement include the language, "e.spire shall pay for the NNI port on USWC's Frame Relay Switch." e.spire opposes inclusion of this provision. We agree with e.spire, and direct that its proposed Paragraph J(6)(a) be incorporated into the agreement.

6. In support of its position, USWC, cites the statement in Decision No. C98-1057, paragraph 14, that:

"e.spire must also pay for the NNI port on U S WEST's switch." However, e.spire correctly points out that the quoted statement was made with reference to interLATA connections; Paragraph J(6)(a) of the amended interconnection agreement concerns intraLATA frame relay traffic. e.spire is also correct that its proposed language is consistent with the directives entered in Decision Nos. C98-1057 and C98-1286.

7. The third controversy involves Paragraphs J(6)(c) and (g) of the amended interconnection agreement. These provisions relate to determining which party initiates a new PVC. In Decision Nos. C98-1057 and C98-1286, we directed that transport and termination of frame relay traffic requires reciprocal compensation. As a surrogate for such compensation, we directed that "the party initiating the new PVC" pay as a recurring charge the tariffed rate for NNI. e.spire now suggests contractual language that, absent clear evidence that both parties' end-users do not consent to the establishment of a PVC over the interconnection, both parties shall be deemed to be the "party initiating a new PVC" (for bi-directional intraLATA PVCs).

8. We agree with USWC that its proposal is the one consistent with our prior decisions in this docket. Further, we agree that it should be practical to determine who initiates a PVC. For these reasons, USWC's proposed contract language will be included in the amended interconnection agreement.

9. Finally, with respect to Paragraph 7(a) of the amended agreement, e.spire proposes inclusion of the following provision: "Until permanent rates for the NNI port are established, e.spire shall pay for the NNI port at the tariffed NNI rate less the applicable resale discount." USWC opposes this provision.

10. We will direct that USWC's proposed Paragraph 7(a) be incorporated into the agreement, because that proposal is consistent with the determinations made in our prior decisions. In Decision No. C98-1057, paragraph 16, we held that e.spire was not entitled to a discount off the tariffed rate for NNI inasmuch as it was already a carrier-to-carrier rate and no discount was appropriate. e.spire relies upon statements made by the Commission in Decision No. C98-1256, paragraph 2, for its claim that the rates for the NNI port were intended to be interim only (pending a future filing by USWC). However, in that paragraph we directed USWC to file proposed permanent rates for the transport and termination of "local" frame relay traffic. Paragraph 7(a) in the amended agreement relates to pricing of interLATA (i.e., non-local) traffic. Therefore, e.spire's reliance on Decision No. C98-1256 is misplaced.

II. ORDER**A. The Commission Orders That:**

1. The Application for Approval of Proposed Amended Interconnection Agreement filed by e.spire Communications, Inc., on April 7, 1999, and the Application for Approval of Amendment to Interconnection Agreement filed by U S WEST Communications, Inc. on April 7, 1999 are each denied.

2. Within 15 days of the effective date of this Order, e.spire Communications, Inc., and U S WEST Communications, Inc., shall jointly file an application for approval of an interconnection agreement incorporating the terms approved in the above discussion. The applications filed on April 7, 1999 by the parties reflected agreement on a number of provisions. Those provisions shall also be incorporated into the new agreement.

3. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
May 12, 1999.**

(SEAL)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO



ROBERT J. HIX

VINCENT MAJKOWSKI

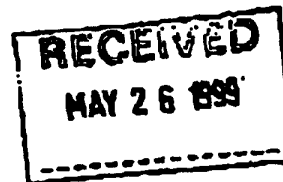
RAYMOND L. GIFFORD

Commissioners

ATTEST: A TRUE COPY

Bruce N. Smith

Bruce N. Smith
Director



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Decision No. C99-125

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 98A-319T

IN THE MATTER OF PETITION OF E*SPIRE COMMUNICATIONS, INC. AND
ACSI LOCAL SWITCHED SERVICES FOR ARBITRATION OF AN AMENDMENT OF
AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC.
PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996.

RULING ON APPLICATION FOR REHEARING,
REARGUMENT, OR RECONSIDERATION,
MOTION TO FILE RESPONSE, AND
MOTION FOR ENLARGEMENT OF TIME

Mailed Date: February 2, 1999
Adopted Date: January 27, 1999

I. BY THE COMMISSION:

Statement

1. On January 8, 1999, e*spire Communications, Inc., and ACSI Local Switched Services, doing business as e*spire Communications ("e*spire"), filed their Application for Further Rehearing, Reargument, or Reconsideration ("RRR") to Decision No. C98-1286. U S WEST Communications, Inc. ("USWC"), has filed its Motion for Leave to File Response in Opposition to e*spire's application for RRR, and a response to the application. Now being duly advised in the premises, we enter our rulings on these matters.

2. USWC's motion for leave to file a response will be granted. For the reasons stated in our prior rulings in this case, e*spire's application for RRR will be denied.

3. On January 8, 1999, e*spire and USWC filed their Joint Motion for Enlargement of Time in which to File Amended Contract. Since e*spire did file a new application for RRR, the time for filing an amended contract, in accordance with Decision Nos. C98-1057 and C98-1295, has already been extended past January 7, 1999. Therefore, the motion will be denied as moot.

II. ORDER

A. The Commission Orders That:

1. The Application for Further Rehearing, Reargument, or Reconsideration by e*spire Communications, Inc., and ACSI Local Switched Services, doing business as e*spire Communications is denied.

2. The Motion for Leave to File Response in Opposition to e*spire Communications, Inc., and ACSI Local Switched Services, doing business as e*spire's Application for Further Rehearing, Reargument, or Reconsideration is granted.

3. The Joint Motion for Enlargement of Time in which to File Amended Contract is denied as moot.

4. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
January 27, 1999.

(3 2 2)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO



ROBERT J. HIX

VINCENT MAJKOWSKI

Commissioners

ATTEST: A TRUE COPY

- - *Bruce N. Smith*

Bruce N. Smith
Director

COMMISSIONER R. BRENT ALDERFER ABSENT
BUT CONCURRING.

22 1998

Decision No. C98-1286

SIMONS, CUDDY & FRIEDMAN
ATTORNEYS AT LAW

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 98A-319T

IN THE MATTER OF PETITION BY E•SPIRE COMMUNICATIONS, INC. AND
ACSI LOCAL SWITCHED SERVICES FOR ARBITRATION OF AN AMENDMENT OF
AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC.
PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996.

RULING ON APPLICATIONS FOR REHEARING,
REARGUMENT, OR RECONSIDERATION,
AND MOTION FOR CLARIFICATION

Mailed Date: December 18, 1998

Adopted Date: December 3, 1998

I. BY THE COMMISSION:

A. Statement

This matter comes before the Commission for consideration of the Application for Rehearing, Reargument, or Reconsideration ("RRR") of Decision No. C98-1057 filed by U S WEST Communications, Inc. ("USWC"), on November 18, 1998. Additionally, e.spire Communications, Inc., and ACSI Local Switched Services, Inc., doing business as e.spire ("e.spire"), filed its Motion for Clarification or in the Alternative Application for Rehearing, Reargument, or Reconsideration on November 19, 1998. Now being duly advised in the premises, we enter the rulings set forth in this order.

B. Discussion

This matter concerns e.spire's petition that the Commission arbitrate its request for an interconnection agreement with USWC. That petition for arbitration was made pursuant to the provisions of 47 U.S.C. § 252 of the Telecommunications Act of 1996 ("Act"). In Decision No. C98-1057, we directed that USWC interconnect its Frame Relay Network ("FRN") with that of e.spire under the terms and conditions contained in the decision. Both USWC and e.spire request reconsideration of the directives in Decision No. C98-1057.¹

C. Application for RRR by USWC

1. USWC first reiterates its argument that interconnection of its FRN with that of e.spire's cannot be ordered under § 251(c)(2) of the Act.² Because Frame Relay Service ("FRS") entails the use of dedicated facilities by private parties for private use--an offering akin to private line service--instead of exchange or exchange access service, USWC contends, that § 251(c)(2) does not apply. We reject these arguments for the reasons stated in Decision No. C98-1057 (pages 7-11). We note that FRS is a telecommunications service offered to the general public, and we specifically conclude that interconnection of the FRNs of USWC and e.spire is contemplated by § 251(c)(2).

¹ As stated below, since e.spire's pleading was late-filed, we will accept it as a motion for clarification only.

² 47 U.S.C. § 251(c)(2).

2. Next, USWC's application for RRR again asserts that, regardless of the applicability of § 251(c)(2), pricing in this case should follow USWC's existing tariff for FRS. We disagree for the reasons articulated by e.spire. The present record does not contain sufficient information to support a finding that USWC's tariffed rates comply with the provisions of 47 U.S.C. § 252(d), and, therefore, adoption of those rates as part of the present arbitration would be inappropriate. For this reason, USWC will be directed to file proposed permanent rates for the transport and termination of local Frame Relay traffic and the establishment of data link connection identifiers ("DLCIs") within three months of the effective date of the present order.³

3. In its application for RRR, USWC then argues that, to the extent § 251(c)(2) is applicable to this proceeding, interconnection with e.spire must be limited to local traffic and cannot apply to "interexchange" FRS. USWC equates e.spire's request to the manner in which it provides access to interexchange carriers as an input to toll services; such access is not provided under § 251(c)(2). However, we agree with e.spire that the services it seeks to offer qualify as the provision of exchange service and exchange access to others. Therefore, USWC's request for modification of our order will be denied.

³ Decision No. C98-1057 directed USWC to file these tariffs within three months of that order. In light of the filing of applications for RRR in this case, the instant decision will modify that requirement to direct that the filing occur within three months of the effective date of this order.

4. USWC also challenges specific pricing directives in Decision No. C98-1057. First, the application for RRR disputes the decision that USWC share the costs of interconnection equally for intraLATA trunks connecting e.spire's FRN with USWC's. In its view, USWC receives no benefit from such interconnection when e.spire initiates the interconnection. We disagree. As pointed out by e.spire, interconnection is bi-directional and will permit USWC's customers to communicate with e.spire's customers. Therefore, the sharing ordered in Decision No. C98-1057 is appropriate.

5. With respect to interLATA connections, USWC suggests that e.spire pay trunk and network-to-network-interface ("NNI") rates in accordance with its existing tariff, instead of unbundled network element rates for DS1 and DS3 transport. We affirm Decision No. C98-1057, and reject these suggestions.⁴ As for the NNIT charge with respect to intraLATA connections, the Commission has found that a form of reciprocal compensation is appropriate. That is, because of the potential imbalance in the required "size of the pipe" (USWC's terminology) to send the data for the customers of the respective interconnecting entities, a purely "bill and keep" compensation methodology would not be appropriate. The form or method of the reciprocal compensation

⁴ The application for RRR also requests clarification that our order is not intended to affect interstate frame FRS. We note that the order establishes requirements for interconnection of the FRNs of USWC and e.spire only.

should capture any imbalance in costs incurred by the carriers while recognizing that the provision of intraLATA FRS service is accomplished as an interconnection between local carriers. Thus, when an entity initiates new demands for expanded intraLATA service from the other carrier, any additional NNIT should be paid as the surrogates for reciprocal compensation.

6. With respect to DLCI charges, USWC again disagrees with our setting of the rate at \$10. The application for RRR asserts that there is no evidence in the record to support this rate. However, we note that the evidence of record indicated that the time for establishing the DLCI was ten minutes (for software programming). In light of that evidence, we conclude that the \$10 charge is reasonable at this time. USWC has been directed to file proposed new rates for this element.

7. USWC, in its application for RRR, continues to oppose reciprocal compensation for the transport and termination of local frame relay traffic. According to USWC, frame relay traffic is not presently measured by origination and termination, and to do so would cost a significant amount of money. Applicant e.spire appears to agree with USWC's contention. Decision No. C98-1057 (paragraph 1st page 13) directed that, as a surrogate for reciprocal compensation (based upon actual traffic), the party initiating the new private virtual circuit ("PVC") pay as a recurring charge the tariffed rate for NNI. Additionally, the carrier initiating the new PVC must pay the wholesale rate

for advanced services for the remaining portion of the connection, which includes the user-to-network-interface and the access link. While Decision No. C98-1057 ordered a surrogate rate, instead of reciprocal compensation, the decision does direct USWC to submit proposed rates based upon a reciprocal compensation methodology. On reconsideration, we clarify that USWC's future rate proposals and cost studies need not be based upon a method which measures originating and terminating traffic. The future proposals may be based upon NNIT charges, so long as the supporting cost studies are filed with its proposals.⁵

8. Finally, USWC seeks clarification of paragraph 17 (page 14 of Decision No. C98-1057) that in the interLATA context its end-user customer remains a USWC customer, and that customer should pay for the end-user segment of the PVC. We agree with this request for clarification and will grant it.

D. e.spire Motion for Clarification

1. As noted above, e.spire's alternative application for RRR was untimely filed. Section 40-6-114(1), C.R.S., permits the filing of applications for RRR within the 20-day period of time from issuance of the Commission's decision, or, "... within such additional time as the commission may authorize upon request made within such period...." Since e.spire's application for RRR was not filed within 20 days of Decision No. C98-1057, and since

⁵ All cost studies in support of the proposed charges (e.g., studies for the higher kb/second NNIT rates) must be filed with the Commission.

no request for an extension of time was made within that 20-day period, the Commission will not consider the alternative application for RRR. However, the Commission will consider e.spire's pleading to the extent it requests clarification of our decision.

2. Applicant e.spire first suggests that in the intraLATA context, a request for connection is mutual; therefore, e.spire requests clarification that each party should pay the other for the DLCI and transport and termination. We agree with respect to the DLCI and now clarify the decision in accordance with e.spire's request. The requested clarification is rejected with respect to transport and termination.*

3. Applicant e.spire next notes that the Frame Relay Access Link ("FRAL") is the equivalent of a local loop. As such, e.spire requests clarification that, since an end-user can use the same FRAL to establish new PVCs with other carriers, neither party, for both intraLATA and interLATA PVCs, should be required to compensate the other carrier for FRALs. We clarify that in the intraLATA context, neither party will pay the other for the

* Applicant e.spire's next claim (page 5) concerns a portion of transport and termination. The Commission ordered the NNIT charge as part of a surrogate for transport and termination. This charge includes the NNI port. Applicant e.spire requests reconsideration of this ruling, suggesting that the NNI port is, in fact, part of interconnection, not part of transport and termination. Therefore, it seeks a reduction in the charge to the fully allocated cost contained in the late-filed cost study. As a request for reconsideration, the suggestion is untimely as noted above. Further, we note that neither e.spire nor USWC supported the late-filed cost study in this case. In addition, we point out that the surrogate rate is interim only and will be reexamined when USWC files its rate proposals and cost studies pursuant to the decisions in this docket. For all these reasons, we deny e.spire's request here.

FRAL. However, in the interLATA context, the party initiating the new PVC will pay for the FRAL.

4. Applicant e.spire then notes that, as part of the transport and termination charge, it will be compensating USWC using the UNIT charge from the tariff, but at a wholesale rate. Applicant e.spire points out that this charge varies, depending on the number of PVCs, with a reduction in the incremental rate. Accordingly, e.spire requests clarification of the precise rate, suggesting the incremental rate for the sixth PVC. This request is reasonable and will be granted.

5. Finally, e.spire seeks clarification of our order requiring USWC to file permanent rate proposals: (1) Permanent rates are to be set for the NNI port, the UNI port, and inter-office transport; (2) a permanent non-recurring rate is to be set for the establishment of the DLCI; and (3) all cost studies in support of the rates are subject to review by e.spire in advance of the filing. Except for the request for advance review of the cost studies by e.spire, the request for clarification will be granted.

E. Ruling on Motions

The Motion to Accept as Timely Filed e.spire's Motion for Clarification or, in the Alternative, Application for Rehearing, Reargument, or Reconsideration will be granted with respect to the motion for clarification, and is otherwise denied. The Motion for Leave to File Response to Application for Rehearing,

Reargument, or Reconsideration of USWC and for Waiver of Response Time filed by e.spire will be granted.

II. ORDER

A. The Commission Orders That:

1. The Motion to Accept as Timely Filed e.spire's Motion for Clarification or, in the Alternative, Application for Rehearing, Reargument, or Reconsideration filed by e.spire Communications, Inc., and ACSI Local Switched Services, Inc., is granted consistent with the above discussion only, and is otherwise denied.

2. The Motion for Leave to File Response to Application for Rehearing, Reargument, or Reconsideration of U S WEST Communications, Inc., and for Waiver of Response Time filed by e.spire Communications, Inc., and ACSI Local Switched Services, Inc., is granted.

3. The Application for Rehearing, Reargument, or Reconsideration filed by U S WEST Communications, Inc., on November 18, 1998 is denied.⁷

4. The Motion for Clarification or in the Alternative Application for Rehearing, Reargument, or Reconsideration on November 19, 1998 filed by e.spire Communications, Inc., and ACSI Local Switched Services, Inc., on November 19, 1998 is

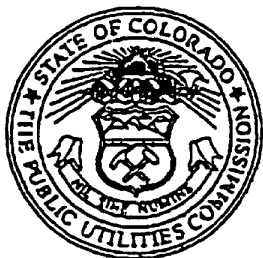
⁷ Decision No. C98-1057 is clarified in response to the application, as discussed above.

granted consistent with the above discussion only, and is otherwise denied.

5. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 3, 1998.

(SEAL)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT J. HIX

VINCENT MAJKOWSKI

ATTEST: A TRUE COPY

Bruce N. Smith

Bruce N. Smith
Director

R. BRENT ALDERFER

Commissioners

Decision No. C98-1057

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 98A-319T

IN THE MATTER OF PETITION OF E-SPIRE COMMUNICATIONS, INC. AND
ACSI LOCAL SWITCHED SERVICES FOR ARBITRATION OF AN AMENDMENT OF
AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC.
PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996.

INITIAL COMMISSION DECISION

Mailed Date: October 29, 1998
Adopted Date: October 29, 1998

Appearances:

Carol Smith-Rising, Esq., Santa Fe, New
Mexico; Brad E. Mutschelknaus, Esq.,
Washington, D.C., Pro Hac Vice; and Edward A.
Yorkgitis, Jr., Washington, D.C., Pro Hac
Vice for E-Spire Communications, Inc., and
ACSI Local Switched Services; and

Kathryn E. Ford, Esq., and Kevin Pernell,
Esq., Denver, Colorado, for U S WEST
Communications, Inc.

I. BY THE COMMISSION

A. Statement

1. This is an arbitration proceeding under § 252 of
the Communications Act of 1934 ("Act"),¹ as amended by the Tele-
communications Act of 1996 ("1996 Act"),² and under this Com-
mission's rules governing arbitration, 4 Code of Colorado Regula-

¹ 47 U.S.C. §§ 151 et seq.

² Pub. L. No. 104-104, 110 Stat. 56.

itions ("CCR") 723-46. Petitioners E-Spire Communications, Inc., and ACSI Local Switched Services, Inc., doing business as E-Spire Communications, Inc. (collectively "E-Spire"), filed their Petition for Arbitration with this Commission on July 14, 1998. The petition concerns E-Spire's request to interconnect its frame relay services ("FRS") network to the FRS network of U S WEST Communications, Inc. ("U S WEST"). E-Spire gave notice of the arbitration on July 14, 1998. U S WEST filed its response to the petition on August 10, 1998.

2. On August 14, 1998, E-Spire filed a Motion for Summary Decision which motion was denied by Decision Nos. R98-829-I and R98-884-I. The arbitration was scheduled to be held October 7 and 8, 1998 at 9:00 a.m. in a Commission hearing room in Denver, Colorado.

3. At the assigned place and time an Administrative Law Judge ("ALJ") called the matter for hearing. During the course of the hearing Exhibits 1, 1A, 1B, 2, 2A, 2B, 2C, 2D, 3, 4, 5, 5A, 16, 17, 18, 19, 20, and 21 were identified, offered, and admitted into evidence.³ Exhibits 6 through 15 were various Commission decisions, records of this Commission, and tariffs on file with this Commission of which administrative notice was taken.

³ Exhibit 16 was a demonstrative exhibit.

4. During the hearing the ALJ found that U S WEST's responses to certain discovery had been evasive and nonresponsive. As a remedy, he ordered U S WEST to file, as a late-filed exhibit, the cost studies it had prepared in support of its frame relay tariff. The late-filed exhibit was filed on October 13, 1998. The ALJ further authorized E-Spire to comment on this late-filed exhibit in its closing statement of position.

5. At the conclusion of the hearing the ALJ ordered the parties to provide a transcript for the Commission and apportioned the cost of the transcript 50 percent to the petitioners and 50 percent to the respondent.⁴ Closing statements of position were ordered to be filed no later than October 19, 1998. Subsequently the ALJ orally granted a one-day extension of time until October 20, 1998 to file closing statements. Timely statements were filed by both E-Spire and U S WEST.

6. Under the 1996 Act the Commission must make a determination in this proceeding no later than November 4, 1998, which is nine months after U S WEST received a request for negotiation from E-Spire. Because of the deadline for decision under the 1996 Act, the Commission finds that due and timely execution of its functions imperatively and unavoidably require that the recommended decision of the ALJ be omitted and that the Commission make the initial decision in this case.

⁴ See 4 CCR 723-46-6.5.

B. Findings of Fact

1. E-Spire holds a certificate of public convenience and necessity to provide competitive telecommunications services in Colorado. It currently operates local fiber optic networks in Colorado Springs, and it has purchased and installed a Lucent Technologies 5ESS switch in Denver. E-Spire also provides local exchange services in Colorado via the resale of U S WEST's wholesale products. It has recently installed a frame relay switch in Colorado Springs.

2. This proceeding concerns the frame relay network's ("FRN") of U S WEST and E-Spire. A FRN is often referred to as a frame relay "cloud". The cloud is actually a data network constructed of frame relay switches connected together by a series of high speed trunk facilities. The FRNs of U S WEST and E-Spire connect to their customers in essentially the same manner. The customers access the FRN by purchasing a user-to-network interface ("UNI") and an access link or access line. The customer designates the locations to be connected over the FRN by a private virtual circuit ("PVC"). A PVC is not a dedicated connection for the exclusive use of an end user, which is what a private line would be. Rather, the PVC is a series of software commands located in the switches which guarantees a customer a connection on demand between the stated points. When the customer is not using the PVC, the capacity in the FRN is not being used

and may be used by other customers. This gives the FRN one of its distinctive characteristics, namely, the ability to allow customers to send "bursty" data traffic beyond the guaranteed capacity if there is excess capacity on the network.

3. The FRN of U S WEST is separate and apart from the switched voice network. It is a packet network which transmits customer data in discrete packets across multiple transmission paths, unlike a voice circuit which is a continuous connection over a given pathway.⁵ A customer on an FRN must specify both ends of the desired data connection in order for the service to be provisioned. Except for the specified connection points, a customer on a FRN will not be able to communicate with any other customer on the FRN. Most PVCs on the FRNs are between the same entities or affiliates. However, if two distinct entities wish to interconnect via the FRN this can be accommodated, although it is not common.

4. U S WEST has FRNs in both LATAs in Colorado. However, it does not provide interLATA service. E•Spire currently has a frame relay switch located in Colorado Springs. E•Spire desires to use this switch to provide frame relay services to end user customers both on an intralATA and an interLATA basis.

⁵ Of course, the given pathway for a voice connection may change from call to call; however, for the duration of the call the pathway does not change.

5. The FRNs of U S WEST and E*Spire are largely equivalent in terms of functionality, types of facilities deployed, and architecture. There is no technical barrier to interconnecting the two networks. Interconnection between the two networks would require a network-to-network interface ("NNI") port at each carrier's frame relay switch, with an NNI connection for the transport of data between the two NNI ports. The locations which would be connected by the PVCs would have to be specified by assigning each location a Data Link Connection Identifier ("DLCI"), which would require a one-time software programming change. This takes less than ten minutes. Once the addresses are specified, the NNI ports provisioned, and a transport medium established between the two NNI ports, an end user on U S WEST's network would have a PVC with an end user on the E*Spire FRN.⁵

C. Discussion

1. E*Spire's position in this proceeding is fairly straightforward. It seeks to have the interconnection between its FRN and U S WEST's FRN treated the same as an interconnection between U S WEST's voice network and a competitive local exchange

⁵ As noted earlier, there would also need to be a PVC from the NNI to the UNI, and an access line from the NNI to the customer location. Also, there is certain customer premises equipment needed for frame relay communication that is not at issue in this proceeding.

carrier ("CLEC") voice network. Interconnection would be at Total Element Long Run Incremental Cost-based rates. Under E*Spire's view, it and U S WEST would split the cost of the transport element connecting the NNI ports. E*Spire would pay for its NNI port, and U S WEST would pay for its NNI port. Each party would provide their own PVC from the frame relay switch to the end location.¹ Concerning reciprocal compensation for the transport and termination of local traffic, E*Spire suggests that a bill and keep approach is appropriate given the bidirectional and bursty nature of the exchange of data traffic over dedicated PVCs and the difficulty this presents for measurement. It suggests that if bill and keep is unacceptable, then there should be some transport and termination charge based on incremental costs. E*Spire opposes a separate trunking requirement for intraLATA and interLATA traffic. It suggests using the ratio of the number of local PVCs divided by the total number of PVCs on a given transport facility.

2. U S WEST suggests that FRNs are nothing like voice networks. Rather, in U S WEST's view they are private networks, sort of an evolution of private lines. U S WEST suggests that the proper model for viewing interconnection of these private networks is contained in its tariffs. The tariffs embody the

¹ For interLATA PVCs, E*Spire suggests that it will compensate U S WEST for U S WEST's PVC.

view that U S WEST will connect two private networks, but not at U S WEST's expense. That is, a network seeking to connect to U S WEST's FRN would be required to pay 100 percent of the transport medium connecting the two NNI ports. In addition, the outside network seeking connection would be required to pay for the NNI port on U S WEST's frame relay switch and for the PVCs running to the end customer.

3. E*Spire supports its requested relief by directing this Commission's attention to several decisions of the Federal Communications Commission ("FCC"). First, E*Spire puts forth a recent Memorandum, Opinion, and Order released August 7, 1996 by the FCC ("706 Order").⁸ E*Spire notes that in the 706 Order the FCC considered the question of whether the packet switched networks of incumbent local exchange carriers ("ILECs") such as U S WEST are subject to the interconnection obligations under § 251(c)(2) of the Act. The FCC concluded that these advanced services were telecommunications services, and not information services. Further, the FCC noted that telephone exchange service includes comparable service by which a subscriber can originate and terminate a telecommunications service, not limited to voice. It rejected U S WEST's contention that telephone exchange service

⁸ In the Matter of Deployment of Wavelength Services Offering Advanced Communications Capability, CC Dockets Nos. 98-147, 98-26, et al.

referred only to circuit switched voice telephone service. The FCC thus held that ILECs were subject to the interconnection requirements of both §§ 251(a) and 251(c)(2) of the Act with respect to their packet-switched networks.

4. The 706 Order did not explicitly refer to frame relay networks in its discussion of advanced services. E*Spire suggests that this Commission refer to a prior FCC decision which discussed the question of treatment of frame relay services. In particular, Exhibit 12 in this proceeding is a decision of the FCC⁹ wherein it determined that frame relay service is a basic service and not an enhanced service. The FCC required all facilities-based common carriers providing it to provide it pursuant to tariff. E*Spire concludes that the net result of these two FCC decisions is that frame relay services are subject to § 251(c)(2) of the 1996 Act, requiring among other things, cost-based rates for interconnection and reciprocal compensation for the exchange of traffic.

5. U S WEST responds to this argument by noting that frame relay services were not the subject of the 706 Order and are different in some respects from the services discussed in that order. U S WEST reminds the Commission that the Independent

⁹ In the matter of Independent Data Communications Manufacturers Association, Inc., 10 FCC RCD No. 26 (1995) ("Independent Data Order").

Data Order of the FCC predates the 1996 Act and the provisions requiring interconnection which E•Spire seeks to utilize. U S WEST suggests that the pre-1996 Act case did not envision the type of interconnection requirements and pricing requirements which would be encompassed in the future, and cannot apply to this situation. It insists that FRNs are private networks, and the 1996 Act deals with the interconnection of public networks.

6. The Commission finds the logic and arguments of E•Spire persuasive as to the import and effect of the 706 Order and the Independent Data Order. The FRN of U S WEST is a publicly offered network of advanced telecommunications services. Interconnection of the FRNs of E•Spire and U S WEST should be accomplished in accordance with § 251(c)(2) of the Act.¹⁰ To simply require E•Spire to purchase retail NNI services out of U S WEST's tariff would completely ignore E•Spire's status as a CLEC. It would preclude carrier-to-carrier interconnection as envisioned by the 1996 Act. As a CLEC, E•Spire is entitled to utilize whatever provisions of the 1996 Act it deems appropriate, not just those suggested by U S WEST.

¹⁰ U S WEST admitted in pleadings in this proceeding and conceded at hearing that the 706 Order mandates this; yet, it has argued otherwise in its posthearing statement of position.

7. The above is consistent with the FCC's 706 Order and the Independent Data Order. Adopting U S WEST's version of this proceeding could only be done by carving out exceptions to those two orders, which the FCC has declined to do. We also decline.

8. Having determined that interconnection must be accomplished under § 251(c) of the Act, the Commission is bound to set the rates and conditions in accordance with that section and § 252(d) of the Act. That latter section requires that interconnection rates be cost based, non-discriminatory, and may include a reasonable profit.

9. U S WEST suggests that, in the event § 251(c) applies to FRS, its existing tariff rates satisfy the conditions. U S WEST also notes that E*Spire produced no cost studies, and suggests that the cost studies supplied by U S WEST as a late-filed exhibit are unreliable.

10. E*Spire agrees that no cost studies sufficient to support a finding are contained in the record. It proposes a surrogate pricing system using prices previously established by this Commission in Docket No. 96S-331T. It suggests sharing equally the costs of an intraLATA interconnection, each party paying for its own NNI ports. For interLATA traffic, E*Spire would compensate U S WEST for its NNI port, using the trunk port charge adopted in Docket No. 96S-331T. Also for interLATA traf-

fic, E•Spire would compensate U S WEST for transport between the switches using the UNE rates for DS1 and DS3 transport from Docket No. 965-331T.

11. For intraLATA traffic, E•Spire suggests that each party would bear its own costs to establish DLCIs. For interLATA PVCs, E•Spire would compensate U S WEST at a \$10, one-time charge which is based on one-half of U S WEST's non-recurring "additional PVC" charge from its frame relay tariff.

12. As noted previously, E•Spire suggests that bill and keep is an appropriate reciprocal compensation scheme for the transport and termination of local frame relay traffic carried over intraLATA PVCs. For interLATA PVCs, E•Spire suggests that the U S WEST end user be charged for the U S WEST end user access link plus the U S WEST UNI port and access to U S WEST's network.

13. For the most part the Commission agrees with the E•Spire proposal to use surrogate prices developed from the prices set by the Commission in Docket No. 965-331T. However, the E•Spire proposal that combined interLATA and intraLATA trunking be permitted cannot be allowed. This Commission has consistently required separate trunking in the voice arena to preclude U S WEST from carrying any interLATA traffic. There must be separate trunks for interLATA and intraLATA traffic between the frame relay switches.

14. Thus for the intraLATA trunks, the parties should share the costs of interconnection equally, using the UNE rates for DS1 and DS3 transport determined in Docket No. 96S-331T. For the interLATA connection, E*Spire must pay 100 percent at the UNE rates for DS1 and DS3 transport set in Docket No. 96S-331T. E*Spire must also pay for the NNI port on U S WEST's switch.

15. Concerning the DLCIs, the party establishing the new PVC should pay for establishing DLCIs at both switches. This is because it is the party causing the new PVC to be established that is causing the costs and provisioning its customer. E*Spire's suggested surrogate rate of one-half the incremental nonrecurring charge for additional PVCs from U S WEST's tariff is reasonable, given the amount of time required. This charge is \$10 per DLCI.

16. Transport and termination of local frame relay traffic requires reciprocal compensation. Bill and keep is not appropriate given the disparities in the sizes of the networks of E*Spire and U S WEST. As a surrogate, the party initiating the new PVC should pay as a recurring charge the tariffed rate for NNI. No discount is appropriate since this is already a carrier to carrier rate. E*Spire as a carrier can consolidate traffic, which differentiates it from an end user. In addition, the carrier initiating the new PVC shall pay the wholesale rate for advanced services for the remaining portion of the connection,

which includes the UNI and the access link. E•Spire may use U S WEST's rates until it establishes its own, should U S WEST seek to establish a new connection on E•Spire's network.

17. E•Spire should pay compensation for the end user segment of interLATA PVCs. This is not a U S WEST customer as E•Spire suggests, but rather E•Spire's customer using U S WEST's facilities. E•Spire should pay U S WEST based on the wholesale discount for this portion of the transmission..

18. Concerning the surrogate rates for transport and termination of local traffic and the establishment of DLCIs, U S WEST will be ordered to file permanent rates for the transport and termination of intraLATA traffic and the establishment of DLCIs within three months of the effective date of this order.

II. ORDER

A. The Commission Orders That:

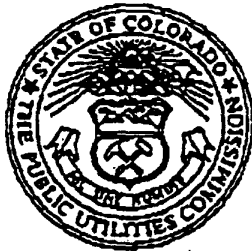
1. U S WEST Communications, Inc., shall modify its interconnection agreement with the petitioners by allowing for interconnection of frame relay networks under the terms and conditions set forth above. The parties shall execute such a modification to their agreement and file it with the Commission for approval within 20 days of the effective date of a final order in this docket.

2. U S WEST Communications, Inc., shall file new tariffs for the transport and termination of local frame relay traffic and the establishment of data link connection identifiers within three months of the effective date of this Order.

3. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 29, 1998.

(s s s s)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT J. HIX

ATTEST: A TRUE COPY

VINCENT MAJKOWSKI

Bruce N. Smith

Bruce N. Smith
Director

R. BRENT ALDERFER

Commissioners